

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

LACI LEANNE BAILEY,

Plaintiff,

vs.

No. 18-cv-0011 SMV

**NANCY A. BERRYHILL,
Acting Commissioner of Social Security Administration,**

Defendant.

ORDER GRANTING ATTORNEY FEES UNDER EAJA

THIS MATTER is before the Court on Plaintiff's Motion for Attorney Fees Pursuant to the Equal Access to Justice Act, with Supporting Memorandum [Doc. 29], filed on January 18, 2019. The Commissioner has not responded to the Motion. The parties consented to the undersigned's entering final judgment in this case. [Doc. 20]. Having reviewed the Motion, the record, and the applicable case law and being otherwise fully advised in the premises, I find that the Motion is well-taken and should be granted. Plaintiff is awarded \$7,475.60 in attorney fees.

Defendant's response to Plaintiff's Motion was due on February 1, 2019. *See* D.N.M.LR-7.2(a) ("A response must be served and filed within fourteen (14) calendar days after service of the motion."). Defendant neither filed a response nor requested an extension to do so. "The failure of a party to file and serve a response in opposition to a motion within the time prescribed for doing so constitutes consent to grant the motion." D.N.M.LR-7.1(b). Because Defendant's failure to respond to Plaintiff's Motion constitutes consent to grant it, the Court will treat Plaintiff's Motion as unopposed and grant it.

IT IS THEREFORE ORDERED that Plaintiff's Motion for Attorney Fees Pursuant to the Equal Access to Justice Act, with Supporting Memorandum [Doc. 29], is **GRANTED**, and Plaintiff is awarded \$7,475.60 for payment to her attorney for services before this Court, as permitted by the Equal Access to Justice Act, 28. U.S.C. § 2412, and in accordance with *Manning v. Astrue*, 510 F.3d 1246, 1255 (10th Cir. 2007).

IT IS FURTHER ORDERED that if Plaintiff's counsel is ultimately granted attorney fees pursuant to 42 U.S.C. § 406(b) of the Social Security Act, counsel shall refund the smaller award to Plaintiff pursuant to *Gisbrecht v. Barnhart*, 535 U.S. 789, 796 (2002) ("Congress harmonized fees payable by the Government under EAJA with fees payable under § 406(b) out of the claimant's past-due Social Security benefits in this manner: Fee awards may be made under both prescriptions, but the claimant's attorney must 'refun[d] to the claimant the amount of the smaller fee.'" (quoting Act of Aug. 5, 1985, Pub. L. 99-80, § 3, 99 Stat. 186)).

IT IS SO ORDERED.



STEPHAN M. VIDMAR
United States Magistrate Judge
Presiding by Consent